

# Human Rights Theory and Human Rights History:

## A Tale of Two Odd Bedfellows

by Samantha Besson and Alain Zysset\*

*„Charakteristisch für den hier eingeschlagenen Weg ist nämlich eine spezifische Weise der Verknüpfung von Begründungsargumenten und historischer Reflexion, die sich so in den Geschichten der Menschenrechte oder in den philosophischen Ansätzen nicht findet und dort in der Regel auch gar nicht angestrebt wird. Die ehrgeizigen philosophischen Begründungsversuche kommen ohne Geschichte aus. Sie konstruieren ihre Argumente aus dem (angeblichen) Charakter der praktischen Vernunft und des moralischen Sollens, den Bedingungen eines Gedankenexperiments über die Einrichtung von Gemeinwesen oder den Grundzügen eines idealisierten Diskurses heraus. Zur Geschichte stehen solche Konstruktionen notwendig in einem merkwürdigen Spannungsverhältnis. Merkwürdig muss ja aus dieser Perspektive erscheinen, dass in der Geschichte der Menschheit zeitlos Gültiges nur so selten als solches erkannt wurde. [...]*

*Die Geschichtsschreibung wiederum wird zwar häufig, bewusst oder unbewusst, von Vorstellungen über philosophische Begründung durchsetzt sein; [...]. Als Wissenschaft muss sie aber ihren Anspruch auf die empirische Ebene einer sachgemässen Rekonstruktion historischer Prozesse begrenzen. In ihrer Arbeitsteilung bekräftigen Geschichtswissenschaft und Philosophie damit die Unterscheidung von Genesis und Geltung, die von vielen für eine Grundlage jeder rechtlichen Beschäftigung mit normativen Fragen gehalten wird. Entweder, so diese Denkweise, steht der Geltungsanspruch normativer Sätze zur Diskussion, oder wir interessieren uns für ihre geschichtliche Herkunft. Zur Entscheidung über den normativen Geltungsanspruch kann in dieser Perspektive geschichtliches Wissen nichts, jedenfalls nichts Ausschlaggebendes beitragen.“*

Hans Joas, *Die Sakralität der Person. Eine neue Genealogie der Menschenrechte* [2011], 12–13

### ***I. The prima facie opposition between human rights theory and history***

The burgeoning of recent publications on human rights shows how fashionable an object of study international human rights have become lately, and this especially among philosophers<sup>1</sup> and historians.<sup>2</sup> Curiously, however, given that joint development, human rights theorists and human rights historians seem to be following separate paths, without much interaction between them besides historians “showcas[ing] the theoretical and philosophical debates about the meaning of human rights”<sup>3</sup> and theorists gesturing at some of the historical origins of the concept of human rights usually to then distance themselves from them.<sup>4</sup>

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1 See e.g. *Henry Shue*, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1996); *James W. Nickel*, *Making Sense of Human Rights* (2007); *James Griffin*, *On Human Rights* (2008); *Charles Beitz*, *The Idea of Human Rights* (2009); *Carl Wellman*, *The Moral Dimensions of Human Rights* (2011).

The specific question that arises for human rights theorists in this context is not only whether human rights history should matter for their normative endeavour,<sup>5</sup> but also how it could be integrated methodologically in the latter, if at all.<sup>6</sup> Is human rights history more than a source of information for the philosopher of human rights? Should it be used, for instance, to identify the object of human rights theorizing and then maybe to interpret it? And may it provide a critical tool for non-ideal human rights theories? Those issues are even more pertinent for legal theorists of human rights as, within legal science, both history of law and philosophy of law have been cultivated in a more integrated fashion not only in relation to law itself<sup>7</sup> but also in relation to one another,<sup>8</sup> than in their non-legal counterparts such as economics or sociology where the history and philosophy of economic and social behaviour are usually conducted outside the boundaries of the discipline, and separately at that.

At first sight, of course, historical interpretations and normative theories of human rights appear to be entirely distinct projects, and their respective methods at odds with one another. This tension between the two disciplines, and the corresponding scientific gap have been captured very well by Hans Joas in the excerpt quoted above.<sup>9</sup>

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2 See e.g. *Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999); *Paul G. Lauren, The Evolution of International Human Rights: Visions Seen* (2003); *Kenneth Cmiel, The Recent History of Human Rights, American Historical Review* 109:1 (2004), 117–135; *Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001); *Lynn Hunt, Inventing Human Rights: a History* (2007); *Johannes Morsink, Inherent Human Rights: Philosophical Roots of the Universal Declaration* (2009); *Samuel Moyn, The Last Utopia: Human Rights in History* (2010); *Roland Burke, Decolonization and the Evolution of International Human Rights* (2010); *Stefan-Ludwig Hoffmann/Samuel Moyn* (ed.), *Human Rights in the Twentieth Century* (2011), *Akira Iriye/Petra Goedde/William I. Hitchcock*, (ed.), *The Human Rights Revolution, An International History* (2012). See also in the legal history of international human rights, e.g. *Alfred William Brian Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2004); *Ed Bates, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010); *Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law* (2012); *Aryeh Neier, The International Human Rights Movement: A History* (2012) and in the intellectual history of human rights and especially of natural rights *Michael Zuckert, Natural Rights and the New Republicanism* (1994) and *Knud Haakonssen, Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (1996).

3 See *Iriye/Goedde/Hitchcock*, op.cit., 15.

4 See e.g. *Nickel*, op. cit., 7.

5 It is important to distinguish the (social) history of human rights *qua* norms and institutions, that is our topic here, from the (intellectual) history of the idea of human rights and hence from the history of theories of human rights. It suffices to think of Haarscher 1993's book to see how a book on the history of human rights theories across centuries can go by the name of human rights theorizing. Of course, the latter project *qua* legal project may be explained as a human rights theory project by reference to the fact that legal theories of human rights are more present in the legal practice of human rights than in their other social practices: the law often tells a story about its norms and makes it stick, and this is particularly the case with their intellectual history. Cf. *Guy Haarscher, Philosophie des droits de l'homme* (1993).

6 Of course, the reverse question may also be raised from the perspective of human rights history, but it will not be broached in full in this article. Although one of us is trained as a historian, we are writing this article from the perspective of political and legal philosophy.

7 There are many reasons for this that we cannot expand on here. One of them is the social role of the law and hence its historicizing role as a result in entrenching history within social norms. Another distinct reason pertains to law's claim to legitimate authority, and how the latter may be closely related to historical claims in many cases.

8 Of course, depending on one's legal theory, the relationship to social facts and hence to their history will be more or less central. The kind of legal theory of human rights at stake in this article is clearly normative, however, albeit being of a normative positivist kind.

On the one hand, an idea central to human rights theory is that human rights are rights we have just by virtue of being human, and this makes them inherently a-historical or, at least, trans-historical.<sup>10</sup> When approaching human rights *qua* universal moral rights, as a result, many moral and political philosophers concentrate on the foundational moral value of human rights as an historically “incomplete idea”<sup>11</sup> to be specified with appropriate normative reasoning. They see their task as identifying the interests and values that might illuminate the moral reality of human rights and ultimately expunge the imperfect lists of human rights we currently find in international human rights law.

Of course, the resources of intellectual history (i.e. the history of political and moral ideas) and legal history (i.e. the history of legal norms and institutions) are sometimes used by human rights theorists. However, theorists resort to them merely as evidence for the need for normative theorizing and for a rational construction of a more determinate concept of human rights. James Griffin, for instance, insists on resorting to the resources of intellectual history to identify the conceptual and justificatory deficit in our contemporary idea of human rights. He starts by observing that “the notion of human rights that emerged by the end of the Enlightenment – what can reasonably be called the Enlightenment notion – is the notion we have today. There has been no theoretical development of the idea itself since then”.<sup>12</sup> History (of ideas) here is merely instrumental to capturing the indeterminateness of the concept of human rights. There is nothing in the history (of ideas) that might help us reconstruct its content and interpret it. On the contrary, in their normative enterprise, human rights theorists actually reject the use of contingent historical elements due to their over-constraining effects on current interpretations of the concept of human rights.<sup>13</sup>

On the other hand, on the history side of the debate, historical interpretations (in particular, within transnational and social history) are often employed to contest the normative enterprise in human rights theorizing. If we put aside cultural historians whose theoretical assumptions explicitly vindicate the very possibility of idealized rational reconstructions of normative statements, historical studies of human rights mostly reveal that human rights give different reasons for action depending on historical circumstances. They might even go further and claim that those reasons trigger action only in a unique and finite set of conditions. In this sense, human rights history radically differs from normative theorizing about them. The retrospective explanation of some past event (and its possible continuity and significance until today) is its foundational and sufficient condition. Normative theory *qua* idealized rational reconstruction of the desirability of norms is largely extraneous to this enterprise.

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9 Joas puts the point as follows: “philosophical justifications do not need history. In the case of human rights, they mostly develop their arguments out of the alleged character of reason or moral obligation as such, out of the conditions of a thought experiment or the fundamentals of an idealized rational discourse”. *Hans Joas*, *The Emergence of Universalism: An Affirmative Genealogy*, in: Peter Hedström and Björn Wittrock (ed.), *Frontiers of Sociology* (2009), 18.

10 See e.g. *Griffin*, *On Human Rights*, 48–51. See, however, the criticism of Griffin on this point in *John Tasioulas*, *Taking Rights out of Human Rights*, *Ethics* 120 (4) (2010), 647–678.

11 *Griffin*, *On Human Rights*, Chapter 1.

12 *Ibid.*, 13.

13 See e.g. on the exclusion of historical-origins arguments for or against the universal justification of human rights, *Allen Buchanan*, *Human Rights and the Legitimacy of the International Order*, *Legal Theory* 14 (1) (2008), 39–70.

This normative reluctance and methodological modesty of historians is related to the constraining social-scientific requirement of their discipline: history *qua* social science amounts, in some important part at least, to re-enacting the internal perspective of the historical actors at some point in time as exclusive and authoritative criterion of historical truth. In this sense, the historical method actually overlaps with that of social interpretation we find in the social sciences; they use interpretive methods derived from hermeneutics in which the task is to grasp the meaning of human rights from a given internal perspective and at a given historical point. As such, historians face the epistemic limits of accessing the very time-constrained and space-relative objects they seek to understand. As William Dray explains, “the historian must penetrate behind appearances, achieve insight into the situation, identify himself sympathetically with the protagonist, project himself imaginatively into the situation”<sup>14</sup> – and that is all he is asked to do: not to justify the reason that human rights give but merely explain their occurrence.

The emerging picture is that historical approaches of human rights and normative theories of human rights seem to have irreconcilable aims and, accordingly, incompatible methods. The argument defended in this article, however, is that although historical approaches and normative theories of human rights have distinct disciplinary territories, it is that very separation that makes them non-mutually exclusive and actually complementary. The suggestion indeed is not to straddle their scopes and methods, whether by making a normative use of history or by historicizing normative theory, or by developing a third way.<sup>15</sup> On the contrary, normative theory, when it is engaged with the normative practice of human rights and methodologically equipped to do so, might welcome historical interpretations as an important, but not ultimate, tool for the interpretation of human rights. Just like historians, normative theorists must identify their object and hence learn how to differentiate between the realities of human rights and to isolate a given human rights practice as their object of study.

More specifically, our claim in this article is that institutions of human rights (as opposed to their supposedly moral reality, their intellectual and social genesis or their transnational meaning), and in particular legal institutions, provide a fruitful *locus* to explore and attenuate the tension between moral philosophers and historians in the specific case of human rights. Regrettably, the legal-institutional dimension of human rights has so far been rather neglected in the normative theory of human rights. This is surprising given both the central legal dimension of international human rights and the recent research on the institutional-directedness of rights as a normative category.<sup>16</sup> Human rights have a dynamic character that is reflected in the localized circumstances of their legal-institutional frameworks where their

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14 William Dray, *The Rationale of Actions*, in: Michael Martin (ed.), *Readings in the Philosophy of Social Science* (1994), 173.

15 On such a third way, see e.g. Hans Joas, *Die Sakralität der Person. Eine neue Genealogie der Menschenrechte* (2011). On some of the dangers of transcending too quickly the boundaries between international legal history and international legal theory, see e.g. Alexandra Kemmerer, *The Turning Aside: International Law and Its History*, in: Russell A. Miller/Rebecca M. Bratspies (ed.), *Progress in International Law* (2008), 71–94, 72, 79.

16 Christian Reus-Smit, *On Rights and Institutions*, in: Charles R. Beitz/Robert E. Goodin (ed.), *Global Basic Rights* (2009).

duties are recognized, specified and allocated without necessarily affecting their universal character. It is in this legal-institutional specification process that normative theorists of human rights, both moral and legal, need historians and can fruitfully incorporate their findings, and vice-versa.

The remainder of our argument will be four-pronged. We will, first, present in more detail what the role of history has been in recent human rights theorizing (II.) and, second, the role of normative categories in recent human rights historiography (III.). In a third step of the argument, we will then move to show how beneficial it may be for the method of normative theorizing on human rights to incorporate some of the observations made by human rights historians (IV.). We will then conclude with a methodological proposal for future research in human rights theory (V.).

## II. *The role of history in recent human rights theories*

Current human rights theories are divided into so-called ‘ethical’ and ‘political’ conceptions of human rights, depending on whether they share the idea that human rights ought to be morally grounded or not and hence depending on how they are situated with respect to their political and legal practice.<sup>17</sup> The way in which those human rights theories relate to human rights history varies accordingly.

In the ‘ethical conception’, first of all, intellectual history clearly contributes to making the primary choice of the concept or, at least, conception of human rights that will then become the object of human rights theorizing. For Griffin, for instance, it is the Enlightenment concept he identifies as the notion of human rights we still use today.<sup>18</sup> The same idea is defended by Jeremy Waldron who understands the contemporary notion of human rights as a revival of the natural rights tradition.<sup>19</sup> Others, like James Nickel, choose a concept of human rights that is historically closer, that of the post-1945 human rights.<sup>20</sup> Another way in which intellectual history comes into the picture of human rights theory is as a way of diagnosing the indeterminateness of the concept of human rights. According to Griffin, for instance, “we agree that human rights are derived from ‘human standing’, or ‘human

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17 James Griffin and John Tasioulas are two important representatives of the ethical or traditional conception. See Griffin, *On Human Rights*, but also James Griffin, *Human Rights and the Autonomy of International Law*, in: Samantha Besson/John Tasioulas (ed.), *The Philosophy of International Law* (2010); see Tasioulas, *Taking Rights out of Human Rights*; John Tasioulas, *Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps*, *European Journal of Philosophy* 10 (1) (2002), 79–100; John Tasioulas, *The Reality of Human Rights*, in: Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (2004). Charles Beitz, Joseph Raz and Joshua Cohen are three important representatives of the political or practical conception, see Beitz, *op. cit.*; Joseph Raz, *Human Rights without Foundations*, in: Samantha Besson/John Tasioulas (ed.), *The Philosophy of International Law* (2010); Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, *Journal of Political Philosophy* 12 (2) (2004), 190–213. The seminal ideas present in those accounts are found in John Rawls, *The Law of Peoples* (1999), 36–38, 65–66, 78–81.

18 Griffin, *On Human Rights*, 13.

19 See Jeremy Waldron, *The Decline of Natural Right*, in: Allen W. Wood/Songsuk Susan Hahn (ed.), *The Cambridge History of Nineteenth Century Philosophy* (2012), forthcoming.

20 Curiously, Nickel regards his concept as a-historical and contrasts it with “historic ideas of natural rights”, Nickel *op. cit.*, 7.

nature’, but there is virtually no agreement about the relevant sense of these two criteria-providing terms”.<sup>21</sup> History, and in particular intellectual history of the Enlightenment, is therefore used at a preliminary stage to identify the object of normative theorizing, on the one hand, and to indicate and justify the need for that normative theorizing, on the other.

Curiously, however, Griffin tends to neglect the legal-institutional history of international human rights and institutions as a resource to help reduce the conceptual and justificatory deficit of human rights when he works out their normative meaning. This is because Griffin’s reconstruction rapidly operates at a level of normative reasoning that is largely independent of the legal and political realities of (international) human rights and focuses on the need to find a concept suitable to provide normative guidance. However, there can only be normative guidance if sufficient resources are spent “on the institutional frameworks within which certain types of political activity are sustained, and more normatively, the values and objectives that political activity and organization might realize, and conditions under which they are realized”.<sup>22</sup>

Furthermore, as Buchanan points out, there is a “concept of human rights, one which emerged in the West, as Griffin notes, in the eighteenth century, that makes no reference to the state system”<sup>23</sup> However, Griffin is theorizing the moral reality of human rights as independent from the basic facts of international human rights law and practice – most notably, the fact that human rights are directed towards the structures of international politics and its overarching limitative role of the sovereignty of states. If Griffin had taken the international history of human rights more seriously, then he would have had to address, for instance, the egalitarian dimension of international human rights.<sup>24</sup>

As Buchanan persuasively argues, “the philosophers’ inattention to the role of the status-egalitarian element in international human rights may be the result of a neglect of history”.<sup>25</sup> Finally, and more generally, as Dworkin argues, normative concepts like human rights need to be interpreted in a way that engages history, albeit not in a way in which history can fix interpretation as in the historical approach to political concepts.<sup>26</sup> Current paradigms of human rights are historically dependent, albeit not necessarily all the way back to the 18<sup>th</sup> Century. One may think, for instance, of the institutional, individual and positive dimensions of the current international human rights practice, features that ought to be a key part not only of the identification of the object of normative human rights theorizing, but also of a correct interpretation of those rights.

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21 *Ibid.*, 16.

22 *Mark Philp*, *Political Theory and History*, in: David Leopold/Marc Stears (ed.), *Political Theory: Methods and Approaches* (2008), 129.

23 *Allen Buchanan*, *The Egalitarianism of Human Rights*, *Ethics* 120 (4) (2010), 681.

24 See e.g. *Samantha Besson*, *The Egalitarian Dimension of Human Rights*, *Archiv für Rechts- und Sozialphilosophie Beiheft* (2012), in press.

25 *Buchanan*, *The Egalitarianism of Human Rights*, 688–689.

26 *Ronald Dworkin*, *Justice for Hedgehogs* (2011), 350.

By contrast, secondly, the so-called ‘political conception’ in human rights theory does not fare much better in terms of its reference to human rights history. Of course, those authors refer much more systematically to the history of international human rights law and institutions.<sup>27</sup> However, they rely on normative patterns of international political practice to fill the gap without addressing the moral concern behind that practice properly. As a result, it is as if their over-emphasis on history then made their leaping back into normative theorizing less convincing.<sup>28</sup>

Charles Beitz, for instance, defends a normative model of human rights that mirrors the function(s) human rights play in global political practice; in response to ethical theorists, Beitz claims that we should focus on the roles that human rights play in global politics – in order to “understand how these objects called human rights operate in the normative discourse of global political life”.<sup>29</sup> This approach illuminates, according to Beitz, the fundamentally non-moral character of global human rights: “human rights do not appear as a fundamental moral category [...]. Human rights operate at a middle level of practical reasoning, serving to organize these further considerations and bring them to bear on a certain range of choices”.<sup>30</sup> True, Beitz does not fully discard normative theory, as historians tend to, but he believes that moral analysis does not illuminate overarching normative patterns – most importantly, their capacity to trigger international concern. This functional understanding of human rights is analogous to John Rawls’ understanding of justice; human rights’ role in public reason defines their very concept – their distinctive purposes and modes of action independently of their content or basis.

Although Beitz devotes entire sections of his monograph to the history of international human rights (in his so-called “historical precis”<sup>31</sup>), the functional approach may not be entirely convincing to historians. Beitz’s objective is to defend a normative conception of human rights – that is, to propose a test that can do the job of distinguishing human rights within a range of rights and claims. However, the nature of the interests that give reasons for action is surprisingly neglected; the interests, Beitz argues, must be “sufficiently important when reasonably regarded from the perspective of those protected that would be reasonable to consider its protection to be a political priority”.<sup>32</sup> A more engaged historical approach may have provided the resources to illuminate the nature of those interests to a greater extent, depending on the period and institutional framework covered and this without affecting the core of Beitz’s scrupulous attention to practice that historians would certainly prefer to practice-independent approaches.

In short, therefore, there are two complementary historical traditions from which human rights theorists draw: first, the history of political and moral ideas that helps focusing on the gap between the development of the human rights practice and its philosophical justification; and, second, the history of international legal human rights norms and institutions that helps flesh out their correct interpretation. Even if they do not on their own trigger the need for a

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27 See *Beitz*, op. cit.; see also *Raz*, *Human Rights without Foundations*.

28 For a critique of Beitz and the argument that legal theory may be the best way of theorizing the normative practice of human rights, see *Samantha Besson*, *Human Rights qua Normative Practice: Sui Generis or Legal?*, *Transnational Legal Theory* 1 (1) (2010), 127–133.

29 *Beitz*, op. cit., 102.

30 *Ibid.*, 127–128.

31 *Ibid.*, 14–27.

32 *Ibid.*, 137.

normative argument – again, there are a couple of other routes that lead to that diagnosis – , historical elements clearly play three roles in setting the scene for normative human rights theorizing: first, they contribute to identifying the concept of human rights, i.e. identifying the object of human rights theory; second, they help justifying the need for a more determinate concept, i.e. justifying the role of human rights theory; and, finally, they contribute to interpreting and understanding the meaning of human rights, i.e. reconstructing the normative content of human rights.

### III. *The normative question in recent human rights histories*

The definitional content of human rights as they literally present themselves is highly a-historical. Human rights seem indeed to allege a universal moral truth about human beings; as such, their philosophical reconstruction would seem to require an exercise of idealized rational justification that goes beyond the foundational goal and the resources of historical approaches. Moreover, the point of normative theory is not only to illuminate the point and purpose of some on-going normative practice, but also to provide suitable concepts and principles to guide human and institutional behaviour. This need for guidance drives philosophers towards an idealized and therefore de-historicised frame of reference and this “historiophobia”<sup>33</sup> leads them to resort to substantive values and intuitions articulated in moral and political philosophy.<sup>34</sup>

The discipline of history, generally speaking, tends to be skeptical of such a-historical assertions and moral truths about human beings. As Samuel Moyn puts it, “universalistic and formalistic languages always have a historically specific and ideologically particular meaning, which it is the mission of historians to seek out”.<sup>35</sup> Not only is history limited to the explanation of past events – that is, the identification of the unique conditions by which some historical event or sequence could possibly develop – , but historians tend also to support, at a more abstract and systematic level, the claim that normative concepts are mediated through the conditions in which historical protagonists find themselves in, i.e. “a strain between their traditional respect of the local and renewed interest in the global”.<sup>36</sup> The a-historical character of idealized rational justifications of norms is not only foreign to historians, as a result, but it also looks implausible to them. Except when they refer to some explicit or implicit social theory that precisely vindicates the very possibility of idealized rational justifications, historians of human rights usually look to anchor the reception of human rights in more pervasive existing social processes and meanings that reveal their inevitably idiosyncratic character.<sup>37</sup>

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33 Hans-Johann Glock, *Analytic Philosophy and History: A Mismatch?*, *Mind* 117 (468) (2008), 868.

34 *Ibid.*, 137.

35 Samuel Moyn, *Personalism, Community, and the Origins of Human Rights*, in: Stefan-Ludwig Hoffmann/ Samuel Moyn (ed.), *Human Rights in the Twentieth Century* (2011), 86.

36 Cmiel, *op. cit.*, 119.

37 See for example Geuss in his criticism of human rights *qua* rights. He believes human rights will exist only when history will have established reliable enforcement institutions. See *Raymond Geuss, History and Illusion in Politics* (2001), 143–146. See also Vincent in the introduction to his book on the politics of human rights: “It is a mistake to argue that humans, by the mere fact of being human, have rights, and that humans are in some way morally considerable in themselves, regardless of social or political context”. See *Andrew Vincent, The Politics of Human Rights* (2010), 1. For Vincent, it seems that addressing the political structures in which human rights are embedded necessarily excludes the possibility of normative reconstruction of the idea of human rights as those rights we have just in virtue of our humanity.



There is number of ways to conduct historical inquiry into human rights depending on whether one belongs to the tradition of ‘transnational’ or to that of ‘social’ history.

First of all, ‘transnational’ human rights historians. Conceptual unity and a level of abstraction are crucial to this first group of historians of human rights. They involve a distinctive methodology and a macro-level of analysis involving actors such as states, NGOs, civil societies. The history of international political and legal culture implies reconstructing the continuity of the role of human rights in its supposedly transnational flux and generally over longer historical sequences. Mark Mazower, for instance, emphasizes the prevalent status of ‘civilization’ in transnational history, i.e. a “concept bound up with the idea of freedom, humanity and rights, and one whose demise could not but affect the projection and political significance of those values as well”.<sup>38</sup> Andrew Vincent, in turn, understands the distinctive historical role of human rights in its essentially responsive character to the abuses that the celebration of the nation-state could ultimately justify and that culminated in the institutionalized atrocities of Nazi Germany. Human rights performed this responsive and gap-filling function: “it gave rise a demand, a demand which sought a voice. It found that voice in human rights”.<sup>39</sup> Vincent’s argument of human rights is holistic: human rights *qua* normative concept are indistinguishable from their being directed towards the abuses of the nation-state’s inclination to exclusion that can be traced back to the organic nation-state theory rooted in Darwinism.<sup>40</sup>

Secondly, ‘social’ human rights historians. Those historians do not welcome this high level of abstraction and the rather long historical sequences covered by transnational approaches to human rights. They think we gain a more accurate understanding of the historical significance of human rights through a more fine-grained investigation of the beliefs and value systems of some well-identified group of protagonists – or even a particular individual – in which human rights take their normative significance. This is where the historian’s methodology is adjusted to more interpretive approaches and often shares the kind of hermeneutic approach favored by sociologists and other social scientists. The extraction of the ‘meaning’ of human rights from the internal perspective of some historical protagonists becomes the prevailing objective.

So far, the emerging historiography of human rights has been dominated by this latter micro-level of analysis; those approaches certainly tend to become the history of localized or particularized meanings of human rights – and their internal universal scope – for a specific group of protagonists, lawyers, supporters or protesters of human rights at some well-delin-

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38 Mark Mazower, *End of Civilization and the Rise of Human Rights*, in: Stefan-Ludwig Hoffmann/Samuel Moyn (ed.), *Human Rights in the Twentieth Century* (2011); see also Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, *The Historical Journal* 47 (2) (2004), 379–398.

39 Vincent, *op. cit.*, 105.

40 As Vincent explains “there is another powerful aspect of the state tradition in the nineteenth and twentieth centuries which overlaps with the civil tradition, that is, the organic nation-state theory. What characterizes this latter theory is a constellation of interests focusing on issues such as nationalism, culture, identity, and race, which have often claimed to be ‘natural’ language of the state. Both of these dimensions of the state tradition configure understandings of citizenship, rights, and law”, Vincent, *Ibid.*, 153.

eated period.<sup>41</sup> As Kenneth Cmiel argues, “historians have been, at least in the twentieth century, for the most part particularists. They want to know in great depth the local scene they survey. An in the recent past, this has meant, more often than not, a sort of reflexive cultural relativism”<sup>42</sup>.

This is the case, it seems, of Moyn’s recent research on the social-catholic roots of international human rights and, more precisely, on the people associated with the personalist creed that was the “principal feature of human rights consciousness of the 1940s, especially, though not exclusively, on the European Continent”<sup>43</sup> and could be conceived as an alternative both to communism and liberalism. In this pioneering article, Moyn identifies Emmanuel Mounier, the founder of the journal *Esprit*, as a central figure of personalism in the early 1930s, and Jacques Maritain in the post-war 1940s. Moyn’s careful focus on the individual- and group-based protagonists of that period in the history of international human rights and their trajectories certainly opens up a new line of research on the history of human rights. In his monograph on the subject, Moyn also repeatedly deconstructs some of the simplistic and somewhat linear explanations of the expansion of international human rights by zooming on the local conditions and the individual profiles whose role appears as decisive for bringing human rights onto the global agenda.

The historicized identification of the normative foundations of human rights usually requires a re-enactment of the very local conditions in which human rights claims are shaped; the historian “must revive, re-enact, re-experience the hopes, fears, plans, desires, views, intentions, of those he seeks to understand”<sup>44</sup>. Similarly, a body of works on the genesis of the core normative content of human rights – that Lynn Hunt identifies as the “imagined empathy” in 18<sup>th</sup>-Century France<sup>45</sup> – illustrates an attempt to ground human rights in deeper historical underpinnings. Of course, this approach assumes that an initial point can be captured from which all subsequent developments in the concept of human rights might be derived, including international human rights.

#### *IV. Benefiting from historical interpretations in human rights theory*

This is not the place to corroborate or challenge those historical interpretations. Rather, our task is to envision how normative theory, driven by a history-based identification of the concept of human rights and historical justification of its determination deficit, could fruitfully incorporate those findings.

The first crucial benefit of historical interpretations of human rights is its attachment to nuance the axiomatic divide between the universalism and particularism of human rights’ normative significance. According to Cmiel, “historians have the opportunity to tug this discussion to a more sophisticated level by refusing to see the particular/universal divide as the last word”.<sup>46</sup> As Cmiel also stresses, by reference to new human rights historians, “these historians refuse to be tripped up by the universal/local divide. Rather, they are writing the local histories of universal claims”.<sup>47</sup>

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41 See also in the context of the recent history of international law, more generally, *Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2001), 6–7; *Kemmerer, op.cit.*

42 *Cmiel, op.cit.*, 119.

43 *Moyn, Personalism, Community, and the Origins of Human Rights*, 86.

44 *Dray, op.cit.*, 173.

45 *Hunt, op.cit.*

46 *Cmiel, op.cit.*, 129.

The reference to the particular geographical and social roots of human rights conditions the idea of a universal normative core of human rights. It is therefore crucial to study the determining conditions by which human rights gain their authority and their public legitimacy. In his impressive study of the role of the United Kingdom in the constitution of the ECHR regime, for instance, Brian Simpson concludes that the document resulted from “complicated interrelationships between individuals and institutions, and governments, with their varied ideological commitments and perceptions of reality, history and self-interest”.<sup>48</sup> History shows better than any other social-scientific discipline that human rights are only idiosyncratically significant.

Of course, this is a dimension of human rights that interest-based theories of human rights, like the ones developed by John Tasioulas’ or Buchanan’s,<sup>49</sup> can account for very well. Their endorsement of the necessary contextualization of the protected interests, before a cascade of many different concrete duties be identified at every given time and across time, illustrates this point.<sup>50</sup> Certain historians would still object to this qualification, however. They may be as just reluctant to pluralism as they are to generality. Historical processes may be similar, but the historian is successful only when he can identify singularity within similar historical processes. The very ambition of pluralism – and of human rights ‘globalism’ more generally – is antithetic to the defining feature of historical events as finite events.

Secondly, history teaches us to nuance the idea of historical progression. The history of human rights has not been linear since their domestic and international legal and political recognition. Cmiel explains that the history of human rights’ activism – taken as the history of “claims across borders in the name of basic rights”<sup>51</sup> – has only been intermittent: “there was no international outcry or organization devoted to the slaughter of Indians in the United States, no important transnational NGOs fighting pogroms against Jews in Russia. There was no real international organized international opposition to European empire, or important groups of activists devoted to securing former slaves their rights in the United States”.<sup>52</sup>

Thus, it would be wrong to assume that the creation of human rights signified the emergence of a genuinely new normative idea – a ‘moral discovery’ following the atrocities of the World War II – and of a normative idea that kept the same moral appeal. Although the aftermath of World War II signified the formal establishment of international (legal) human rights, Moyn and others have shed light on the absence, between the 1950s and the early 1970s, of human rights as determinants in global politics due primarily to the oppositional structure of the Cold War politics: “the language of rights could not determine the choice between a welfarist and a communist scheme – a fact which, more than any other, accounts for the marginalization of human rights as new ideological paradigm at this moment”.<sup>53</sup> Also, the absorption of the normative appeal to human rights into the anti-colonial imagi-

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47 *Ibid.*, 126.

48 *Simpson*, *op.cit.*, VII.

49 See *Tasioulas*, *Taking Rights out of Human Rights*; Buchanan, *The Egalitarianism of Human Rights*; see also Besson, *Human Rights qua Normative Practice: Sui Generis or Legal?*

50 See *Tasioulas*, *Taking Rights out of Human Rights.*, 647–678; see also *Christian Barry/Nicholas Southwood*, *What is Special About Human Rights?*, *Ethics & International Affairs* 25 (3) (2011), 369–383.

51 *Cmiel*, *op.cit.*, 127.

52 *Ibid.*

53 *Moyn*, *Personalism, Community, and the Origins of Human Rights*, 73.

nary and its resurgence against the crisis of the post-colonial state and, more generally, the “failure of moral maximal vision of political transformation”<sup>54</sup> corroborate the origins of the human rights’ rise as *lingua franca* as essentially narrowing the scope of political ideologies and expectations.

Here again, interest-based theories of human rights may be said to account for some of the non-linearity in the human rights practice. Interests remain the same, but their recognition and hence protection against standard threats as human rights can vary with institutional circumstances and changes in those standard threats.<sup>55</sup> The universality of human rights need not be a-historical or trans-historical, as a result.<sup>56</sup> Of course, again, this may not be a sufficiently convincing concession in the eyes of some human rights historians. Those may indeed regard the historical universality of interests as implausible.

Those two seminal observations from human rights history should lead us to revisit the method we use in normative theorizing about human rights. Of course, human rights theorists have already been intensively debating about the ways to conciliate the historical realities of human rights with their moral horizon and about the question of the fidelity to their historical practice. The debate has polarized around the two ideal-typical conceptions presented before.

Unlike normative theorists of human rights such as Griffin, who essentially refer to the history of the idea of human rights to illustrate the conceptual and justificatory deficit of human rights, some theorists take human rights history more seriously when constructing their normative account of human rights. Rainer Forst, for instance, gives political history much more credence. His ‘basic right to justification’ identified as the core normative content of human rights is historically loaded; his understanding of human rights that put “an end to political oppression and the imposition of a social status that deprives one of one’s freedom and of access to the social means necessary to being a person of equal standing”<sup>57</sup> is obtained through a thorough attention to the history of right-claims. Forst ingenuously forges a thinly morally loaded concept, but one which illuminates to a great extent the historical and political practice of (human) rights. He is able to account for the underlying moral basis of human rights, but his account is continuously informed by the historical and political significance of rights claims – the “normative deep grammar of protests and struggles”<sup>58</sup> – and therefore lays the foundations of a historically loaded form of moral constructivism. He avoids, as a result, both the pervasive objection of parochialism and different forms of descriptive reductionism, and paves the way for a historically informed approach to human rights situated between “their normative core as protecting basic human interests, their role in international law and political practice, and their claim to be universally justifiable across cultures and ethical ways of life”.<sup>59</sup>

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54 Ibid., 173.

55 See e.g. Raz, *Human Rights Without Foundations*; Allen Buchanan, *Human Rights and Moral Progress*, in: Cindy Holder/David Reidy (ed.), *Human Rights: The Hard Questions* (2012), forthcoming.

56 See e.g. Tasioulas, *Taking Rights out of Human Rights*; Raz, *Human Rights Without Foundations*.

57 Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, *Ethics* 120 (4) (2010), 725.

58 Jean L. Cohen, *Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization*, *Political Theory* 36 (4) (2008), 598.

59 Forst, *op.cit.*, 706.

One of the difficulties with Forst's account, however, lies in his neglect for the legal history of human rights and, more generally, their legal and institutional dimensions, both domestically and internationally. It is a pity as the legal dimension of human rights provides an object of study for normative human rights theorizing that allows for historical elements to be fruitfully inserted into moral reasoning. The context-transcendent character of Forst's account narrows its ambition to illuminate the disparate political and legal-institutional realities in which human rights are forged and claimed, and his account therefore loses part of its ability for normative guidance.

#### V. *A methodological approach for the future*

*Pro memoria*, the project of incorporating historical findings into normative human rights theorizing must accommodate two premises that ultimately exclude each other and not try to transcend the implied disciplinary boundaries. First, normative theorists of human rights driven by the conceptual and justificatory deficit tend to disregard history as an interpretive tool. The power of the argument depends on its capacity to illuminate, as clearly as possible, the interests that human rights should protect not at some historically defined period, but for our present and future understanding of the term. Together with the inherent a-historical character of human rights *qua* rights we have just in virtue of our humanity and its tendency to reinforce the incentive to de-historicize the idea, the pretention to normative guidance drives normative theorists towards a-historical and idealized frame of reference. Second, historians of human rights driven by the need to explain, and not justify, the rise of human rights as global *lingua franca* insist on their mediated significance. Explanation, by contrast to justification, is about re-enacting the conditions for a time- and space-defined event or sequence of events to develop. The pretention to explanation is clearly extraneous to normative guidance and actually closer to prediction. Close attention to the premised conditions implies addressing the concrete practices and protagonists that contributed (or failed to contribute) to the rise of human rights.

Those respective disciplinary constraints still leave us with enough logical space to envision a methodological framework for normative human rights theorizing that can accommodate the essential expectations of both human rights theorists and historians. The basic distinction between facts and norms – between the *is* and the *ought* – suggests that although there is a fallacy in deriving the *ought* from the *is*, there is no fallacy in *informing* the *ought* with the *is*. That logical space invites historians to play an important, albeit not determining role in a practice-oriented and institutionally attuned normative approach to human rights.

Instead of providing an elaborate example of the proposed approach, this article is limited to lay out its main methodological foundations. We will identify and spell out two of them in this section.

The main methodological point that should be welcomed by normative human rights theorists and historians alike is the importance of differentiating, for the sake of analytical clarity, between the realities of moral, political and legal-institutional human rights *qua* normative practices – independently of how we might subsequently specify the relationship between the law, the morality and the politics of human rights.

For the most part, indeed, normative theorists of human rights have been either practice-independent or practice-dependent. The practice-independent frame of reference usually results in a fairly low standard of practical guidance. But the ambition of practice-guidance must in turn get a sufficient grasp on the normative practices of human rights if it is to guide

anything. The object and aim of normative theorists is certainly not historical, but the resources by which they identify their object and justify their aim have an inherent historical *qua* social-scientific dimension. As Miller puts it, “social-scientific investigation will reveal the shape of the feasibility curve”.<sup>60</sup> The normative practices of human rights are sufficiently developed and complex with respect to the number of agents and institutions that recognize, invoke, interpret and act upon them to call for such a preliminary specification.

The proposed methodological point also applies to so-called political accounts of human rights. In his response to the ethical accounts, Beitz accurately reconstructs the main normative patterns of human rights of the “global human rights enterprise” (through his five “paradigms of implementation”) and concludes to their pre-dominantly political, and not legal, character. Even though Beitz should be credited for his close attention to the prototypical forms of human rights *qua* political practice, his final conception of the “normative breadth of contemporary human rights doctrine”<sup>61</sup> needs to be re-assessed in light of the multiple normative realities of human rights. In particular, we might want to reveal the multiple normative realities of human rights through the legal-institutional frameworks in which they are recognized, invoked and enforced. If Beitz’s argument about the *pro tanto*, rather than conclusive reasons given by human rights is plausible in the context of the “global political life”, the same cannot be said, for instance, for the role that human rights play in the framework of the European Convention of Human Rights (ECHR). The latter’s system entails indeed a permanent judicial organ for adjudicating human rights and figures prominently in the legal order of its States Parties.

A second important methodological enrichment for human rights theorists lies in history’s mediation towards better grasping the legal-institutional reality of human rights. Human rights have a legal-institutional reality that has so far been largely neglected in the normative theorizing of human rights.<sup>62</sup> This is surprising given the recent research on the inherently institutional-directedness of rights as a distinctive normative category. As Christian Reus-Smit explains, rights are predominantly “institutionally referential” in three inter-related senses – institutionally-ambitious, institutionally-presumptive and institutionally-dependent.<sup>63</sup> None of the existing human rights accounts, however, takes that premise sufficiently seriously. Forst’s reconstruction of the grammar of rights, for instance, however illuminating at an abstract level of reflection, remains in need of specification in the concrete manifestation of human rights in a legal-institutional framework.

The embodiment of human rights in various legal-institutional frameworks requires normative theorists to test their account against those specifications. Without it, their accounts remain incomplete in their pretention to normative guidance. In the case of human rights this implies, first and foremost, a close examination of the law of international human rights. The law is an important dimension of the recognition and existence of human rights.<sup>64</sup> Surely,

60 David Miller, *Political Philosophy for Earthlings*, in: David Leopold/Marc Stears (ed.), *Political Theory: Methods and Approaches* (2008), 31.

61 Beitz, *op.cit.*, 114.

62 For this critique, see Besson, *Human Rights qua Normative Practice: Sui Generis or Legal?*; Samantha Besson, *Human Rights: Ethical, Political... or Legal? First Steps in a Legal Theory of Human Rights*, in: Donald Earl Childress (ed.), *The Role of Ethics in International Law* (2012).

63 Reus-Smit, *op.cit.*, 29–37.

64 See Joseph Raz, *Human Rights in the Emerging World Order*, *Transnational Legal Theory* 1 (1) (2010), 31–47; see also Besson, *Human Rights: Ethical, Political... or Legal?*; Samantha Besson, *Human Rights and Democracy in a Global Context – Decoupling and Recoupling*, *Ethics and Global Politics* 4 (1) (2011), 19–50.

there can be legal human rights that are not correlates of universal moral rights, but the latter create duties for legal-institutional recognition and the law of international human rights is therefore a crucial part of their specification as objects of normative analysis. It is important therefore to explain the variety of legal-institutional frameworks in which human rights are recognized, specified and enforced. The ECHR regime, for instance, is distinctive in many respects from the UN Covenants and operates within a vastly different institutional-legal framework.

Human rights have a dynamic character that is reflected in the localized circumstances in which their duties are recognized, specified and allocated without necessarily affecting their universal character from a normative standpoint. It is in this specification process that normative theorists of human rights, both moral and legal, need historians and can fruitfully incorporate their findings. True, the relation between history and normative theory is not always that straightforward. It should be the critical role of historians – through their attachment to nuance, their capacity to distinguish the meaningful within the diverse and anchor a normative practice into a longer continuum – that provides normative theorists with a unique tool of understanding when approaching the practice of human rights. As Philp suggests, “a historical understanding (...) can be a powerful source of illumination and can contribute dramatically to the self-awareness we engage with difficult conceptual and theoretical problems. To that extent there is a clear case for ensuring that political theorists understand something of the history of their discipline”.<sup>65</sup>

Of course, while we have been concerned with the benefits of historical sensitivity in normative human rights theorizing, it is important to stress that the reverse also applies.

To start with, historians, for the most part, need a firmer grasp on the concrete manifestations of human rights before reconstructing some historical sequence or event meaningfully. For the re-enactment to operate, historians cannot rely, as ethical theorists, on their sole moral reality or, as lawyers, on their sole embodiment in legal rules, principles and procedures. The historical sequence must be incarnated in human action and collective behaviour and the causal conditions in which it inheres. As a result, historians should certainly welcome the differentiation and specification of the normative realities of human rights as a preliminary stage of analysis.<sup>66</sup> Human rights amount to more than facts, indeed, and capturing them historically implies some minimal normative understanding of what they are.<sup>67</sup> Such a specification implies in turn privileging a certain conceptual level of analysis and its corresponding level of abstraction and methodology, as indicated earlier.

Moreover, human rights historians also have reasons to focus more carefully on the institutional-legal reality of human rights depending on their affinities with the corresponding conceptual unity, level of abstraction and methodology, as explained before. Legal institutions are identifiable in the social world. They have records and archives. Some important legal institutions – but not all – tend to be more stable over time than other forms of normative practice. Institutions tend to change in significant moments of history. Legal institutions,

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65 Philp, *op.cit.*, 148.

66 This would be the case of some recent incursions of human rights historians into the field of human rights theory. See e.g. *Samuel Moyn, Of Deserts and Promised Lands (on the history of international courts)*, *The Nation*, March 19, 2012.

67 See e.g. *Koskeniemi, op.cit.*, 7, for a discussion of the importance of a clear conceptual frame in international legal history and hence, by extension, of the benefits of the categories developed in normative theory when devising a historiographical project.

by contrast, are reliable sources of normative permanence. They might be investigated at various levels – at the political level of negotiations over their mission, structure and resources, at the legal level of judicial and arbitration bodies over the interpretation of their norms and principles, at the level of bureaucrats and staff that compose their institutional structure, and so on. Surely, historians may be reluctant to focus on the legal-institutional dimension if they assume a prior conception of the determinants of the political – such as realists with international law and institutions. Legal-institutional frameworks would be reduced to some epiphenomenal reality and their isolation as objects of analysis would hardly make sense. But such explanatory reductionism, irrespectively of its internal deficiencies, will not suit normative theorists in their commitment to normative guidance.

In short, legal understandings of human rights and historical human rights are equally inimical to the alternative approach: human rights as practice-independent, universal moral rights.<sup>68</sup> At the same time, however, both legal human rights and historical human rights may be understood as practice-sensitive universal moral rights, i.e. as rights whose substantive moral basis are constrained and specified both by their legal realities and their historical meanings. As result, the legal-institutional reality of human rights provides us with a neat balance between the complexity of historical contingency and the appeal to systematic analysis, moral intuition and normative guidance without having to sacrifice one for the other.

We started this article with Joas' critique of the state of human rights theorizing and are now in a position to conclude more optimistically than he does. The modest methodological proposal we made, however, enables us to see the new historians and theorists of human rights as much more than odd bedfellows. The time of mutual taming and learning has arrived, even if the temptation to transcend disciplinary boundaries should be resisted<sup>69</sup>. To borrow Antoine de Saint-Exupéry's words in *Le Petit Prince*: "What must I do, to tame you?" asked the little prince. 'You must be very patient,' replied the fox. 'First you will sit down at a little distance from me – like that – in the grass. I shall look at you out of the corner of my eye, and you will say nothing. Words are the source of misunderstandings. But you will sit a little closer to me, every day ...'"

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68 See e.g. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*; Griffin, *On Human Rights*.

69 See e.g. Kemmerer, *op.cit.*, 79.